

Virginia:

In the Circuit Court of the City of Richmond, John Marshall Courts Building

LATONYA MALLORY,

Plaintiff,

v.

LECLAIRRYAN, A PROFESSIONAL  
CORPORATION,

Defendant.

Case No.: CL17-6164-8

### MEMORANDUM OPINION AND ORDER

On June 14, 2019, came the parties, by counsel, on LeClairRyan, A Professional Corporation's ("Defendant" or "LeClairRyan") Demurrer to Latonya Mallory's ("Plaintiff" or "Mallory") Complaint. After a hearing on the issues presented in the Demurrer, the Court took the matter under advisement. Upon due consideration of the record and arguments of counsel, the Court finds that Plaintiff is collaterally estopped from re-litigating issues in this Court that were previously decided in the United States District Court for the District of South Carolina (the "District Court"). Being dispositive of the case, the Court will not address the other arguments raised in the Demurrer.

#### **I. Factual Background**

Mallory was a long-time client of LeClairRyan's, a relationship spurred by Mallory's longstanding relationship with Dennis Ryan of LeClairRyan. (Compl. ¶ 1, 21.) When Mallory wrote a business plan for the company that would become Health Diagnostic Laboratory, Inc. ("HDL"), she retained LeClairRyan to advise her on issues related to corporate formation and investor solicitation. (Compl. ¶¶ 22-23.) In November 2008, HDL was incorporated by

LeClairRyan as an S-corporation with the Virginia State Corporation Commission. (Compl. ¶ 22.) Mallory was HDL's Chief Executive Officer and Chair of the Board. (Compl. ¶ 17.)

Mallory established HDL "to be a diagnostic laboratory leader that offered unique, comprehensive test menus of risk factors and biomarkers for cardiovascular and related diseases." (Compl. ¶ 5.) To conduct its testing, HDL relied on blood samples obtained through physician agreements. (Compl. ¶¶ 6, 26.) To facilitate these exchanges, LeClairRyan prepared written agreements whereby physicians would receive processing and handling ("P&H") fees to reimburse them for the cost of services related to the blood samples. (Compl. ¶¶ 7, 12.) LeClairRyan repeatedly advised Mallory that the P&H arrangement did not run afoul of the Stark Act or Anti-Kickback Statute ("AKS"), nor expose Mallory and HDL to liability under the False Claims Act ("FCA"). (Compl. ¶¶ 9-12, 14, 31, 33, 36, 39-40, 42.) LeClairRyan also provided legal services related to HDL's relationship with BlueWave, an entity that provided sales representatives for HDL. (Compl. ¶¶ 49-52.)

In January 2013, the Department of Justice subpoenaed HDL's records related to the P&H agreements. (Compl. ¶¶ 14, 54.) In June 2014, the Office of Inspector General issued a special fraud alert indicating that the P&H arrangement represented a substantial risk of fraud and abuse under the AKS. (Compl. ¶ 55.) The government subsequently brought claims against Mallory and HDL in the District Court. (Compl. ¶¶ 14, 56.) The government also alleged that Mallory and HDL conspired with BlueWave to violate federal law and that the entities' business arrangement violated the AKS. (Compl. ¶¶ 53, 56.) Mallory relied on legal advice from Defendant, which "led to catastrophic results," including the District Court action for violations of the FCA and AKS. (Compl. ¶ 1.)

HDL settled the claims against it for \$47 million, then filed for bankruptcy on June 7, 2015. (Compl. ¶¶ 15, 56.) The Bankruptcy Trustee asserted claims against LeClairRyan, which LeClairRyan settled for \$20.3 million. (Compl. ¶ 15.) On September 16, 2016, the Bankruptcy Trustee also sued Mallory for an amount in excess of \$600 million, alleging claims related to the P&H fees and other practices that resulted from LeClairRyan's advice. (Compl. ¶¶ 16, 57.)

Mallory instituted this action for legal malpractice on December 29, 2017. Mallory demands judgment in the amount of attorney's fees and costs and judgments entered against her in the Bankruptcy and District Court actions, as well as loss of value of HDL and loss of use of funds, an award of not less than \$603,000,000.00. (Compl. ¶63.) At the time the Complaint was filed, judgment had not yet been entered in either federal court; however, both courts have since entered their respective judgments. Most notably, the District Court judgment found Mallory liable for violations of the FCA. (Def.'s Mem. Supp. Dem. Ex. D.)

## **II. Legal Standard**

The function of a demurrer is to test whether a complaint states a cause of action. Va. Code Ann. § 8.01-273. Stated differently, "[t]he purpose of a demurrer is to 'test the legal sufficiency of facts alleged in pleadings.'" *Schmidt v. Household Fin. Corp., II*, 276 Va. 108, 112, 661 S.E.2d 834, 836 (2008) (quoting *Augusta Mut. Ins. Co. v. Mason*, 274 Va. 199, 204, 645 S.E.2d 290, 293 (2007)). "In reviewing the sufficiency of a motion for judgment on demurrer, the trial court is required to consider as true all material facts that are properly pleaded, facts which are impliedly alleged, and facts which may be fairly and justly inferred from the facts alleged." *Luckett v. Jennings*, 246 Va. 303, 307, 435 S.E.2d 400, 402 (1993). However, unreasonable inferences are not given any weight. *Sweely Holdings, LLC v. Suntrust Bank*, 296

Va. 367, 369, 820 S.E.2d 596, 598 (2018). Importantly, a demurrer is not concerned with matters of proof. *Luckett*, 246 Va. at 307, 435 S.E.2d at 402.

### III. Analysis

A legal malpractice cause of action requires “the existence of an attorney-client relationship which gives rise to a duty, breach of that duty by the defendant attorney, and that the damages claimed by the plaintiff client must have been proximately caused by the defendant attorney’s breach.” *Johnson v. Hart*, 279 Va. 617, 625, 692 S.E.2d 239, 243 (2010) (quoting *Rutter v. Jones, Blechman, Woltz & Kelly, P.C.*, 264 Va. 310, 313, 568 S.E.2d 693, 695 (2002)).

Here, Defendant argues on demurrer that Plaintiff is collaterally estopped from re-litigating the issue of whether she relied on the advice of counsel in good faith. Liability under the FCA requires a knowing, willful violation, *see* 31 U.S.C. § 3729(a), which would be inconsistent with good faith reliance on the advice of legal counsel. Thus, whether Mallory knowingly engaged in the conduct complained of, notwithstanding the alleged advice of counsel, would be relevant to the issue of causation in the instant litigation. A finding, as a matter of law, that Plaintiff cannot establish the causation element, would be fatal to her claim for relief.

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#### A. Judicial Notice

As a preliminary matter, the Court must determine whether it is procedurally appropriate to take up Defendant’s collateral estoppel argument on demurrer. Collateral estoppel is a defense typically raised by plea or other motion beyond this stage of the proceedings. As this Court has previously recognized, however, collateral estoppel may be appropriate on demurrer where judicial notice is taken of the record of a prior proceeding. *See, e.g., Taylor v. Southside Voice, Inc.*, No. CL10-4542-00, 2011 WL 12663587, at \*2 (Va. Cir. Ct. July 19, 2011); *Davis v. Allen*, No. LC-2153, 1997 WL 33575425, at \*3 (Va. Cir. Ct. Dec. 23, 1997).

“Judicial notice permits a court to determine the existence of a fact without formal evidence tending to support that fact.” *Barnes v. Barnes*, 64 Va. App. 22, 30, 763 S.E.2d 836, 840 (2014) (quoting *Taylor v. Commonwealth*, 28 Va. App. 1, 7, 502 S.E.2d 113, 116 (1998)) (quotation marks omitted). The taking of judicial notice is within the trial court’s discretion; however, that discretion is limited. *Barnes*, 64 Va. App. at 30-31, 763 S.E.2d at 840.

Generally, “a [trial] court will not take judicial notice of its records, judgments and orders in other and different cases or proceedings, even though such cases or proceedings may be between the same parties and in relation to the same subject matter.” *Fleming v. Anderson*, 187 Va. 788, 794, 48 S.E.2d 269, 272 (1948) (citations omitted). However, there is a well-known exception:

where the plaintiff refers to another proceeding or judgment, and specifically bases his right of action, in whole or in part, on something which appears in the record of the prior case, the court in passing on a demurrer to the complaint, will take judicial notice of the matters appearing in the former case.

*Id.* at 794-95, 48 S.E.2d at 272 (citations omitted); see *Martin v. Martin*, 167 Va. 206, 212, 188 S.E. 148, 150 (1936) (stating that “[n]o formal plea, or evidence in support of averments of such a plea, was necessary to present the facts to the court, as the facts were averred in the bill, or admitted at bar”).

In the present case, the Complaint asserts that Plaintiff relied on legal advice from Defendant, which led to the District Court action for violations of the FCA. Further, Plaintiff seeks to recover attorney’s fees and costs associated with defending against those claims, as well as the amount of the judgment. Moreover, the issue of good faith reliance on the advice of legal counsel was necessarily raised in the District Court case in Plaintiff’s defense. Thus, Plaintiff has referred to the District Court proceeding and judgment, and specifically bases her legal malpractice claim against Defendant, at least in part, on things in the District Court record.

Accordingly, this Court may take judicial notice of the District Court record in ruling on Defendant's claim of collateral estoppel in its Demurrer.

**B. Collateral Estoppel**

1. Choice of Law

Under Virginia law, the doctrine of collateral estoppel consists of four elements:

(1) the parties to the two proceedings must be the same, (2) the issue of fact sought to be litigated must have been actually litigated in the prior proceeding, (3) the issue of fact must have been essential to the prior judgment, and (4) the prior proceeding must have resulted in a valid, final judgment against the party against whom the doctrine is sought to be applied.

*Glasco v. Ballard*, 249 Va. 61, 64, 452 S.E.2d 854, 855 (1995) (citing *Bates v. Devers*, 214 Va. 667, 671, 202 S.E.2d 917, 921 (1974)). Most notable, is Virginia's mutuality requirement—that is, the requirement that the parties to both proceedings be the same. This is relevant here, because the parties to this proceeding and the prior District Court proceeding are not the same. Thus, under Virginia law, Defendant could not use collateral estoppel as a defense.

Conversely, under federal common law, “collateral estoppel precludes relitigation of issues of fact or law that are identical to issues which have been actually determined and necessarily decided in prior litigation in which the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate.” *Va. Hosp. Ass'n v. Baliles*, 830 F.2d 1308, 1311 (4th Cir. 1987) (citations omitted). Unlike Virginia law, federal law does not require mutuality.

As the Supreme Court of Virginia has indicated, “[a] prior federal court judgment is accorded the preclusive effect in subsequent state litigation that the federal courts would have attached thereto.” *Glasco*, 249 Va. at 64, 452 S.E.2d at 855 n.\*; *see also Taylor v. Sturgell*, 553 U.S. 880, 891, 128 S. Ct. 2161, 2171, 171 L. Ed. 2d 155 (2008) (“The preclusive effect of a

federal-court judgment is determined by federal common law.”). More specifically, federal common law applies to prior judgments in federal question cases. *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507, 121 S. Ct. 1021, 1027, 149 L. Ed. 2d 32 (2001) (stating that “in federal-question cases . . . we have long held that States cannot give those judgments merely whatever effect they would give their own judgments, but must accord them the effect that this Court prescribes”).

In the present case, the District Court entered a final judgment in the prior litigation while exercising federal question jurisdiction. Accordingly, the preclusive effect of the District Court judgment is that accorded by federal common law.

## 2. Application

Under federal common law, the doctrine of collateral estoppel precludes the re-litigation of issues that the party against whom it is sought had a full and fair opportunity to litigate. In the District Court action, Plaintiff argued that she relied on the advice of legal counsel in good faith. After litigating the issue, a jury rejected the good faith reliance defense and found Plaintiff liable for violating the FCA.

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Similarly, in the instant action, Plaintiff asserts that the injuries she sustained were directly and proximately caused by Defendant’s legal advice. The District Court previously determined, however, that Plaintiff’s conduct was knowing and willful, and therefore, not based on Plaintiff’s reliance on the advice of counsel. Consequently, the good faith reliance issue, which is relevant to the causation element in this case, has been previously litigated and determined in the District Court case. Accordingly, Plaintiff cannot now relitigate the issue.

Alternatively, the District Court judgment is at least sufficient to establish, as a matter of law, that Plaintiff is contributorily negligent. As the Supreme Court of Virginia has indicated, a

legal malpractice claim may be barred by contributory negligence. *Lyle, Siegel, Croshaw & Beale, P.C. v. Tidewater Capital Corp.*, 249 Va. 426, 432-33, 457 S.E.2d 28, 32 (1995).

Here, the District Court has already determined that Plaintiff knowingly engaged in the conduct complained of. Consequently, Plaintiff is at least partially responsible for the injuries she sustained. Therefore, Plaintiff's claim for recovery is barred.

#### IV. Conclusion

Based on the foregoing, it is hereby **ORDERED** that the Demurrer to the Complaint is **SUSTAINED with prejudice**. It is further **ORDERED** that the case is hereby **DISMISSED**.

The Clerk is directed to forward a copy of this Order to all parties.

**IT IS SO ORDERED.**

ENTER: 8 / 8 / 19

  
C.N. Jenkins, Jr., Judge

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